Volume 53 | Issue 2 Article 3

February 1951

Some Elementary Principles of Constitutional Law

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SOME ELEMENTARY PRINCIPLES OF CONSTITUTIONAL LAW

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WITH all deference to our Supreme Court of Appeals, notice should be taken of the fact that on many occasions in recent years it has apparently lost sight of some of the most basic principles of constitutional law. In quite a few of the cases recognition and application of these principles might well have led to decisions different from those reached by the court. As a consequence, these decisions have created much confusion in the minds of students of constitutional law. It is hoped that a consideration of the cases in their broad outline, without too much regard to the detailed facts involved, may be of help to the student in his effort to resolve this confusion.

The basic principles referred to are probably nowhere better stated than in the following language of Mr. Justice Brandeis, speaking for the Supreme Court in *Ashwander v. Tennessee Valley Authority*:[1]

> "The Court has frequently called attention to the 'great gravity and delicacy of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that . . . federal courts . . . have no power to give advisory opinions . . . .
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> "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
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> ". . . .
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> "2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' . . . 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' . . .
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> "3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. . . .
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> "4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two

[1] 297 U.S. 288, 345-348 (1936).

grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. . . .

". . . .

"7. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' . . . ."

There is today general and for the most part unquestioned acceptance of the essentially American doctrine of the supremacy of law, and its corollary that courts have the power to declare acts of the legislature unconstitutional. This doctrine is now so well established that courts sometimes forget that such judicial power is not a prerequisite to the existence and maintenance of free government and democratic institutions. Take England, for example, where the doctrine of the supremacy of Parliament has seldom been seriously questioned. There is no intention, however, to become involved in a fruitless discussion of the relative merits of judicial supremacy and legislative supremacy. On the contrary, it is taken for granted that the best hope for the preservation of our rights and liberties lies in continued adherence to our unique constitutional doctrine of a supreme and independent judiciary. It should be borne constantly in mind, however, that courts did not achieve their present position of supremacy and independence without meeting and overcoming serious opposition. Their success in this respect was to a large extent due to the development and observance of the constitutional principles quoted above, which for the most part embody self-imposed limitations that courts have adopted for their own guidance. It would seem to follow that if these principles are too often disregarded, courts may endanger their own supremacy and independence. The possibility of this danger warrants a further review of the development and meaning of these principles as expounded by recognized authorities in the field of constitutional law.

In commenting upon the power and duty of courts to pass upon the constitutionality of acts of the legislature, Cooley had this to say:

"Nevertheless, in declaring a law unconstitutional, a court must necessarily cover the same ground which has already been covered by the legislative department in deciding upon the propriety of enacting the law, and they must indirectly overrule the decision of that co-ordinate department. The task

> is therefore a delicate one, and only to be entered upon with reluctance and hesitation. . . . . But the duty to do this in a proper case, though at one time doubted, and by some persons persistently denied, it is now generally agreed that the courts cannot properly decline, and in its performance they seldom fail of proper support if they proceed with due caution and circumspection, and under a proper sense as well of their own responsibility, as of the respect due to the action and judgment of the law-makers."[2]

And again:

> "It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility. The legislative and judicial are co-ordinate departments of the government, of equal dignity; each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of power which, by the Constitution, is not conferred upon it."[3]

These quotations suggest the theoretical difficulty of reconciling the doctrine of judicial supremacy with the equally well-established doctrine of the separations of powers. It may well be that the doctrines as applied by a particular court can be reconciled only if the court, recognizing that there never has been and never can be an absolute and complete separation of powers, has adopted a statement of the doctrine of the separation of powers sufficiently liberal to permit substantial overlapping of the powers of the three departments; and even then the doctrines can be satisfactorily reconciled only if, in the exercise of its power to pass upon the validity of action by the legislature, the court scrupulously observes those self-imposed limitations that were designed to prevent judicial encroachment upon the legislative domain. But however that may be, this much seems clear: The self-restraint exercised by the court should be in direct proportion to the strictness of its doctrine of the separation of powers. Our court seems to take pride in the fact that it has in recent years, and contrary to the general trend, adopted a "new and strict rule"[4] concerning the separation of powers, particularly in respect to the imposition of

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[2] 3 COOLEY, CONSTITUTIONAL LIMITATIONS 334-335 (8th ed. 1926).

[3] *Id.* at 332.

[4] *In re* Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 534, 45 S.E.2d 113, 117 (1947).

legislative or administrative duties on the courts. The court should, therefore, be under the necessity of leaning over backward if need be to assure that it, having the last word, does not unduly encroach upon the powers of the legislature.

During the formative period of our doctrine of judicial supremacy judges and courts were fully aware of this need for self-restraint, and of the dangers inherent in a failure to observe the basic principles of self-limitation quoted above. This is well illustrated by the following classic statement by Chancellor Waties of South Carolina in 1812:

> "It is the peculiar and characteristic excellence of the free governments of America, that the legislative power is not supreme; but that it is limited and controlled by written constitutions, to which the Judges, who are sworn to defend them, are authorized to give a transcendent operation over all laws that may be made in derogation of them. This judicial check affords a security here for civil liberty, which belongs to no other governments in the world; and if the Judges will every where faithfully exercise it, the liberties of the American nation may be rendered perpetual. But while I assert this power in the Court, and insist on the great value of it to the community, I am not insensible of the high deference which is due to the legislative authority. It is supreme in all cases in which it is not restrained by the constitution; and as it is the duty of the legislators as well as of the Judges to consult this and conform their acts to it, so it ought to be presumed that all their acts are conformable to it, unless the contrary is manifest. This confidence in the wisdom and integrity of the legislature is necessary to ensure a due obedience to its authority; for if this is frequently questioned, it must tend to diminish that reverence for the laws which is essential to the public safety and happiness. I am not, therefore, disposed to examine with scrupulous exactness the validity of a law. It would be unwise to do so on another account. The interference of the judicial power with legislative acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power, and so general a prejudice against it, as to lead to measures which might end in the total overthrow of the independence of the judiciary, and with it this best preservative of the constitution. The validity of a law ought not, then, to be questioned, unless it is so obviously repugnant to the constitution, that when pointed out by the Judges, all men of sense and reflection in the community may perceive the repugnancy. By such a cautious exercise of this judicial check, no jealousy of it will be excited, the public confidence in it may be promoted, and its salutary effects be justly and fully appreciated."[5]

[5] Byrne's Adm'rs v. Stewart's Adm'rs, 3 Desaus. 466, 476-477 (S.C. 1812).

That Chancellor Waties' concern for the independence of the judiciary was fully warranted is shown by the recent and fortunately unsuccessful effort of President Roosevelt to pack the Supreme Court.

There is another good reason why courts should not be too free in the exercise of their power to declare acts of the legislature unconstitutional. In the language of Mr. Justice Holmes,

> ". . . . Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[6]

Our system of constitutional government has worked so successfully and has been able to accommodate itself so well to new economic and social conditions mainly, if not only, because the courts by the exercise of self-restraint have left enough play in the joints to permit necessary growth and change. Whenever courts lose sight of this fact and for lack of the requisite self-restraint encroach unduly upon the province of the legislature, they not only interfere with the smooth and orderly functioning of the machinery of government, but they actually threaten the continued existence of our delicately balanced constitutional system.

With these basic principles of constitutional law in mind, let us turn now to a consideration of several recent decisions by our supreme court to determine whether and to what extent these principles have been applied.

A good starting point is the decision in *Wiseman v. Calvert.*[7] In that case Wiseman and others applied to the supreme court for an original writ prohibiting the defendant commissioners of the county court from taking further action in a proceeding then pending before it, in which the other defendants had petitioned for the issuance of a certificate of incorporation of a proposed city. In support of their position the applicants for the writ of prohibition raised several questions concerning the constitutionality of the statute under which the county court was proceeding with the proposed incorporation, two of which the court thought should be decided.

In the first place it was argued that the 1949 statute, transferring from the circuit courts to the county courts jurisdiction

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[6] Missouri, Kansas & Texas Ry. v. May, 194 U.S. 267, 270 (1904).
[7] 59 S.E.2d 445 (W. Va. 1950), 53 W. VA. L. REV. 91 (1950).

over proceedings for the incorporation of municipalities, was unconstitutional in that it undertook to confer judicial powers and impose judicial duties upon the county courts, which with certain minor exceptions not here pertinent are only administrative tribunals under the provisions of our constitution. One might reasonably suppose that this argument would have caused the court some difficulty, in view of the fact that in a long line of decisions it had sustained the constitutionality of statutes conferring this jurisdiction on circuit courts by holding that the incorporation of cities was sufficiently of a judicial nature to permit circuit courts to grant certificates of incorporation, and that such judicial action did not violate our constitutional provision with respect to the separation of powers. The court had no difficulty on this score, however, because of the position it had taken in its then most recent case on the question. In that case, acting in reasonable and logical reliance upon the so-called "new and strict rule" concerning the separation of powers, a circuit court had dismissed a petition for the incorporation of a proposed municipality on the ground that, despite previous decisions to the contrary, the statute authorizing circuit court action in such cases was unconstitutional under the new separation of powers doctrine in that it imposed upon the judiciary the performance of a purely legislative function. Although the supreme court reversed this judgment dismissing the petition, it made the surprisingly frank confession that it agreed with the circuit court that the statute was unconstitutional on this ground, but held that for reasons of public policy it did not feel free to invalidate the statute at this late date because of the consistency with which it had rejected the same argument in the past. On this point the court said:

> "It cannot be doubted that the cases cited and discussed above clearly sustain the power of circuit courts to grant certificates of incorporation. . . The first of those decisions was in the year 1894, the last in 1912, so that, for more than fifty years, such power in circuit courts has been recognized. We are now asked to change the rule thus announced on the ground that in certain cases decided by this court in recent years, we have more strictly interpreted the requirements of Article V of the Constitution of this State as preventing the Legislature from conferring upon courts powers not in their nature judicial. The new and strict rule was first announced in *Hodges v. Public Service Commission*. . . .
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> "We will not attempt to reconcile the decisions pertaining to the incorporation of towns by circuit courts with the

> opinions expressed in the cases last cited above. We think that, in their reasoning, they are in sharp conflict, and, in our opinion, had the principle of the *Hodges* case been applied to the case of *In re Town of Union Mines, supra,* a different decision would have been made. . . . These decisions have always been recognized as exceptions to what, in recent years, we have come to believe is the sound rule as to the separation of powers. . . .
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> ". . . .
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> ". . . We do not believe it wise to overturn the rule announced in the case of *In re Union Mines, supra,* although we do not argue for the soundness of that ruling. . . . In view of the general attitude of this Court, with respect to the separation of power, the Legislature could, if it so desired, make other provision for the incorporation of cities. . . ."[8]

It is just as well that no attempt was made to reconcile these cases because, as the court itself recognized, they can not possibly be reconciled. This being true, one can not help wondering whether the court's "new and strict rule" concerning the separation of powers is the "sound rule". The overwhelming authority and experience of other courts is to the contrary. It would seem that our court should at least re-examine the soundness of its position in light of the present realities of government, particularly in the field of administrative law. No effort will here be made to demonstrate again how illogical and confused is the language of our cases on this subject. That matter has already been attended to in what was probably a more than adequate manner.[9] Suffice it to say for present purposes that when and if our court does re-examine its position, it is hoped that it will realize the impossibility of achieving an absolute and logical separation of powers, with each of the countless functions of government bearing its appropriate tag, executive, legislative, or judicial. It is firmly believed that little can be done to put our cases "in the order of reason" until our court relaxes the strictness of its separation of powers doctrine and attempts to do no more with it than prevent serious encroachment by any one department on the proper domain of another.

Acting upon the court's suggestion in the *Chesapeake* case, the legislature amended the statute by transferring to the county courts jurisdiction over the incorporation of cities. This action by the

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[8] *In re* Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 534-537, 45 S.E.2d 113, 117-118 (1947).

[9] See Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers,* 44 W. VA. L.Q. 270 (1938).

legislature not only obviated to some extent the logical difficulties of the dilemma in which the court found itself when in that case it felt compelled to hold constitutional a statute which it admittedly thought unconstitutional, but also rendered it morally certain that the court would, as it did, sustain the amended statute despite the first argument in the *Wiseman* case that it imposed judicial duties on the county court. Although all previous decisions had upheld the former statute on the theory that the action of the circuit court in respect to the incorporation of cities was judicial or at least quasi judicial, the court in the *Wiseman* case held that identical action by the county court under the amended statute was essentially legislative in nature, and no longer judicial or quasi judicial. After reviewing the numerous cases holding that the writ of prohibition lies only to prevent unauthorized judicial or quasi judicial action by inferior tribunals, the court held further that the writ of prohibition sought by Wiseman would not issue because the county court was exercising only legislative and administrative powers in the incorporation proceeding.

So far there is little difficulty in following and agreeing with the reasoning of the court. Beyond this point, however, the going gets considerably tougher. Since the only question before the court in the *Wiseman* case was that of granting or refusing the writ of prohibition, it would seem reasonable to suppose that, having concluded that the writ would not issue, the court would have stopped right there. The decision not to issue the writ fully and completely disposed of the case. Everything else in the opinion is beside the point. It can not even qualify as an alternative ground for the decision not to grant the writ. Judged by any known test it is at best nothing more than dictum. In fact, if one were searching for an illustration of the difference between the holding of a case and its dictum, he could hardly expect to find a better example. All of which is by way of saying that the court should never have considered the second argument against the constitutionality of the statute, because its decision on the first argument made a decision on the second wholly immaterial.

The second argument referred to was that the statute, as applied to the incorporation of the proposed city which had a population of more than two thousand, was unconstitutional in that it violated the provisions of the constitutional home rule amendment. This argument was obviously premised on the supposition that the court would follow its earlier view that incorporation proceedings

are at least quasi judicial in nature, and hence that even if the court held the performance of such quasi judicial functions by the county court not to be violative of the provisions of the constitution with respect to the separation of powers, it would nevertheless grant the writ of prohibition if it found that the county court was assuming to exercise such quasi judicial powers under the terms of an unconstitutional statute. This supposition proved erroneous when the court changed labels and held that the county court's action was legislative and not judicial or even quasi judicial. It therefore necessarily follows that the validity of the statute was immaterial, because even if the county court was acting wholly without authority under an unconstitutional statute, the writ of prohibition would still not lie because the action was not judicial in nature.

This seems to be so clear that one would hesitate to belabor the point were it not for the fact that the court, referring to these two arguments advanced by the applicants for the writ of prohibition, expressly stated that

> "The first two constitutional issues, being specifically presented and directly involved, will be separately dealt with and resolved."[10]

In view of this statement it is hoped that what would otherwise be painful repetition may under the circumstances be permissible. It is difficult to understand how a determination of the question of the constitutionality of a statute can be "directly involved" unless a decision that the statute is unconstitutional would result in a different disposition of the case. Now admittedly if the statute in this case is constitutional, the writ of prohibition will not lie. Since the court held that the writ would not issue despite its belief that the statute was unconstitutional, the conclusion would seem to be inescapable that it was not necessary to determine the constitutionality of the statute in order to dispose of the case.

We have then in this proceeding a case in which the court did not follow basic constitutional principles that were formulated for the guidance and self limitation of courts in the exercise of their power to declare acts of the legislature unconstitutional. The court did anticipate a question of constitutional law in advance of the necessity of deciding it, and did pass upon the question although there was present another ground involving a question of general law on which the case could be decided.

[10] Wiseman v. Calvert, 59 S.E.2d 445, 449 (W. Va. 1950).

Furthermore, since all that the court had to say concerning the second argument is dictum and does not even qualify as an alternative ground of decision, because as shown above it did not affect the ultimate result, we have here at best only an advisory opinion on this point. It is as if the court had said to the county court that although there is nothing we can do about it in this proceeding, we just thought we ought to let you know that in our opinion the statute under which you are acting is unconstitutional, and we will so hold whenever the question is properly raised for our decision. It is no wonder the county court dismissed the petition despite its success in resisting the application for the writ of prohibition. One might even argue strongly in favor of such an advisory opinion, if the court had had no other way to prevent a result in the particular case that it so obviously felt would be unjust and grossly inequitable. Another way for the court to have done this without declaring the statute unconstitutional will be discussed later.

It is unfortunate that this lengthy recital does not yet exhaust the criticism to which the case is rightly subject in light of established principles of constitutional law. Even if we remove all of the above objections by assuming that the question was properly presented and that the case could not be disposed of without a decision of this constitutional issue, there still remains a serious question concerning the soundness of the court's conclusion that the statute was unconstitutional. Most of the previous criticism was centered around the proposition that, in disregard of constitutional principles that were designed by the courts to relieve themselves whenever possible of the necessity of passing upon the validity of legislation, our court in this as in other recent cases went out of its way to raise and decide a constitutional question. The present criticism is that the court in its actual decision of constitutional questions has disregarded other basic principles of constitutional law that were designed by the courts to restrain themselves from a too ready substitution of their own judgment for the judgment of the legislature, because they realized that this natural tendency if carried too far would result in usurpation by the judiciary of powers rightfuly belonging to the legislature. Among these principles as variously stated are the strong presumption of constitutionality to which all legislation is entitled, the requirement that every reasonable construction which is possible must be placed upon the constitution and the statute in an effort to bring them

into harmony, and the rule that an act may not be declared unconstitutional unless its unconstitutionality is clear beyond all reasonable doubt, or, as Chancellor Waties put it in the language quoted above, "unless it is so obviously repugnant to the constitution, that when pointed out by the Judges, all men of sense and reflection in the community may perceive the repugnancy."

Although the form of their statement may vary, these principles all embody a fundamental truth of constitutional law, that unless courts wish to disturb the delicate balance of our constitutional system, they must exercise the greatest self-restraint in passing upon the validity of legislation, must never declare it unconstitutional unless convinced that the contrary view is wholly unwarranted, and even then should do so only with hesitation and extreme reluctance. These principles are more than mere platitudes to be intoned only in decisions upholding the constitutionality of legislation. Rather should they constitute a litany to be repeated in all cases involving such questions, particularly when the court entertains serious doubts concerning the constitutionality of any legislative action. By no other means can we be sure that the court is constantly aware of the danger of judicial usurpation that is inherent in our doctrine of judicial supremacy.

With this approach in mind, let us consider now the soundness of the court's conclusion that the statute in the *Wiseman* case was unconstitutional. In order to understand fully the issues involved, a word of historical explanation is necessary.

Prior to the adoption of the home rule amendment in 1936, municipalities with a population of two thousand or more were incorporated only by special act of the legislature. In view, however, of the constitutional provision that "The Legislature shall not pass local or special laws . . . for . . . incorporating cities, towns or villages, or amending the charter of any city, town or village, containing a population of less than two thousand . . .",[11] provision was made by general law for the incorporation and government of such municipalities. Under this arrangement, the charter of a city created by special act was found in the act itself and in all provisions of general law concerning the privileges, powers, duties and government of such cities. The charter of all other municipalities was found only in such provisions of general law. In no proper sense did the certificate of incorporation that was issued under general

[11] W. VA. CONST. Art. VI, § 39.

law constitute the charter of the municipality. It was merely a certification that there had been compliance with all conditions that were prescribed by the legislature for the incorporation of the inhabitants of the area defined in the certificate, and that the proposed municipality was therefore duly incorporated, with all the rights, powers and privileges pertaining to such corporations under the general laws of the state.

The former authority of the legislature to pass a special act incorporating a city with a population of two thousand or more was expressly revoked by the home rule amendment to the constitution. Since this amendment was the basis for the court's conclusion that the statute in the *Wiseman* case was unconstitutional, it should be quoted in full:

> "No local or special law shall hereafter be passed incorporating cities, towns or villages, or amending their charters. The legislature shall provide by general laws for the incorporation and government of cities, towns and villages and shall classify such municipal corporations, upon the basis of population, into not less than two nor more than five classes. Such general laws shall restrict the powers of such cities, towns and villages to borrow money and contract debts, and shall limit the rate of taxes for municipal purposes, in accordance with section one, article ten of the Constitution of the State of West Virginia. Under such general laws, the electors of each municipal corporation, wherein the population exceeds two thousand, shall have power and authority to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof, and through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs: Provided, that any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this Constitution or the general laws of the State then in effect, or thereafter, from time to time enacted."[12]

It may be worthwhile to observe that the name of this amendment is misleading in so far as any real grant of constitutional home rule powers is concerned. The proviso contains what Professor Williston used to call weasel words that suck the good out of all that goes before. Though not uncommon in contracts, such words are seldom found in constitutions. Note, however, that after purporting to grant broad home rule powers to the electors of cities with a population of more than two thousand, the amendment goes

[12] *Id.* at § 39(a).

on to say, in effect, that such powers may be exercised only so long as the legislature is willing, and then only to the extent permitted by it. This would seem to follow from the statement in the proviso that any charter or charter amendment adopted by the electors of a home rule city shall be invalid if in conflict with any general law in effect at the time the charter or amendment was adopted or with any general law thereafter enacted. Althuogh under our present general law governing the adoption of home rule charters the legislature has allowed some freedom of choice concerning certain charter provisions, particularly those specifying the plan of city management, this could all be changed at any time. In view of the large measure of control reserved to the legislature by this proviso, there would be nothing to prevent it from withdrawing all this freedom of choice and providing by general law a complete charter for each class of cities. True it would have to leave to the electors the right to frame and adopt a charter, but by providing that the charter should contain certain specified powers, no more and no less, it could under the express language of the proviso make of this right an empty shell. That of course is the purpose of weasel words and the way they usually operate. If this is a correct analysis of the so-called home rule amendment, then for all practical purposes its only necessary effect is to prohibit further incorporation of cities by special act and to require the legislature to provide general laws for the government of cities. All of this is somewhat beside the point, however, and is mentioned only to show that in considering this amendment we are not dealing with a grant of broad constitutional powers that must at all cost be protected from impairment by the legislature.

Under our decisions construing the general laws for the incorporation of municipalities, apparently for many years after the adoption of the home rule amendment there was no method provided for the incorporation of cities containing a population of two thousand or more. In order to correct this deficiency, the legislature in 1949 provided a method for the incorporation of all municipalities in the same statute that transferred jurisdiction of incorporation proceedings from the circuit courts to the county courts. It was argued in the *Wiseman* case that this statute was unconstitutional as applied to the incorporation of a proposed municipality containing a population of more than two thousand because it impaired constitutional rights guaranteed by the home rule amendment. Assuming for the moment that it was necessary to decide the

issue raised by this argument in order to dispose of the case, let us examine the soundness of the court's conclusion that the statute was unconstitutional on this ground.

This will require a consideration of the following questions: What rights are guaranteed by the amendment? Who are the recipients of those rights? Is there any reasonable or permissible interpretation of the amendment and the statute that will bring them into harmony, so that the court may be relieved of the necessity of declaring the statute unconstitutional?

It has already been suggested that whatever may be the rights guaranteed by the amendment, they are at best somewhat nebulous and empty. But however that may be, we still have the question, what is the scope and nature of these constitutional rights, and to whom do they belong? Some of the answers would seem to be clear enough. The amendment confers certain home rule powers on "the electors of each municipal corporation, wherein the population exceeds two thousand". One should be excused for having thought that this language was so clear and unambiguous as to leave no room for construction. The rights are guaranteed only to the electors of certain municipal corporations. It would not be unreasonable to suppose that in the first place a municipality with the requisite population would have to be in existence, which means that it would have to have been previously incorporated; otherwise there could be no electors of the corporation authorized to exercise the home rule powers mentioned in the amendment. Yet our court found this language so ambiguous as to warrant a construction that "electors of each municipal corporation" includes not only the electors living in an incorporated municipality but also the electors living in an unincorporated area of the requisite population with respect to which incorporation proceedings have been instituted. Had the court taken the view that "electors of each municipal corporation" means what it says, there would have been no conflict between the constitution and the statute, because admittedly the code adequately safeguards the home rule rights of electors of incorporated municipalities.

What then are the home rule rights that according to the court were denied by the statute in the *Wiseman* case? They are the power and authority (1) to frame, adopt and amend the charter of the city, and (2) to amend an existing charter. Note first that in providing that the "electors . . . shall have power and authority" to do these things the amendment is granting only a permissive

power. Certainly this is true under all normal rules of construction. As to cities that were incorporated by special act prior to the adoption of the amendment, and cities that were originally incorporated under general law but have since grown to the requisite population, it is clear that the power is permissive only. Of the numerous cities having this permissive home rule power less than half a dozen have chosen to exercise it. This also would seem to indicate that we have here no fundamental right of great constitutional import to be safeguarded, if need be, by a resort to what Pound calls spurious interpretation. It is therefore somewhat difficult to follow the court's reasoning by which the permissive power thus granted was changed into a mandatory power that the electors of all newly-incorporated home rule cities must exercise, apparently before they become electors of the municipality, and before or at least simultaneously with its incorporation. This would necessarily seem to follow from the court's statement that:

> ". . . The words 'frame' and 'adopt' possess a clear and well known meaning and their meaning . . . is *the creation and the adoption of the original charter under which the municipality is incorporated and brought into valid legal existence in the first instance.* In short, to apply the statute to the original incorporation of the proposed municipality of Belle, the population of which is in excess of two thousand, would deprive the electors, within its area of their express constitutional right, under the Home Rule Amendment, to frame and adopt its charter."[13]

In other words, this language of the amendment, "to frame, adopt and amend the charter of such corporation" is in the case of new corporations construed to mean "to frame, adopt and amend the *original* charter of such corporation". It is here that we begin to get lost.

There was a time when municipal corporations were created only by royal grant or by special act of the legislature, and it was then customary to refer to the one instrument or document as the charter of the corporation. Even so, this document was of a dual nature, containing first a grant of the franchise to be a corporation, which was the sovereign act of creation or incorporation, and second a grant by the sovereign of corporate powers, rights and privileges. It is the second grant that comes more naturally to mind when we speak of the *charter of the corporation* as distinguished from the charter or franchise *to be a corporation.* This becomes more evi-

[13] Wiseman v. Calvert, 59 S.E.2d 445, 456 (W. Va. 1950). Italics supplied.

dent when we arrive at the stage of incorporation under general law, when the two grants are more clearly separated. There is first the certificate of incorporation issued by some public body or official, formerly in this state the circuit court, now the county court. The certificate itself is merely a certification that there has been compliance with the requirements laid down by the Legislature as conditions precedent to incorporation. The issuance of the certificate by the duly authorized agency represents then the sovereign creative act of the legislature. As the language of the certificate itself states, the charter powers of the corporation must be found in the general laws governing such corporations.

The adoption of the home rule amendment did not change any of this so far as incorporation is concerned. In the language of the amendment, "The legislature shall provide by general laws for the incorporation and government of cities, towns and villages. . ." The only change was in respect to the grant of corporate powers. Instead of having to operate under a grant of powers drawn up by the legislature alone, home rule cities are now permitted to write their own list or grant of charter powers, except in so far as such powers may be denied to them under existing or future law. Certainly the court did not intend to say that the electors of proposed home rule cities may themselves create the corporation, yet this seems implicit in the statement italicized above, that the right guaranteed by the home rule amendment is "the creation and the adoption of the original charter under which the municipality is incorporated and brought into valid legal existence in the first instance." There is the further practical difficulty of compliance with this interpretation in the actual process of drafting and adopting the charter. What about the election of the charter board, the submission of the proposed charter to the voters, the possibility of its rejection and the necessity of redrafting, and so on? Must all this be done and a charter adopted before the certificate of incorporation may be issued? In any event, a construction of the constitution that raises so many logical and practical difficulties should not be resorted to if by any other reasonable interpretation these difficulties would disappear. Particularly is this true when, as here, it is only because of this interpretation that there is a conflict between the constitution and the statute.

It is not the purpose of this discussion to show that the court's construction of the home rule amendment is an unreasonable one, or even that an alternative construction is more reasonable. It is

conceded that the interpretation adopted by the court may be reasonable. The Michigan court placed substantially the same construction on its similar constitutional provision, though in a case sustaining rather than invalidating a legislative act.[14] But a concession that the court's interpretation is a permissive or even a reasonable one does not end the matter. We have seen that all constitutional authorities agree that however much the court may prefer its own interpretation, it may not with propriety use it as the basis for declaring an act unconstitutional unless convinced that all other possible interpretations are wholly unreasonable and therefore unwarranted.

As was so clearly pointed out in the dissenting opinion, there is an alternative interpretation which, if not more natural than that adopted by the court, is at least permissible and not wholly unreasonable. Let us assume first that "the electors of each municipal corporation" mean the qualified voters living in each city that has been duly incorporated. This would not seem to be too unreasonable. Next, let us assume that the provision that such electors "shall have power and authority" to exercise certain rights of home rule means that they shall have the power whether they choose to exercise it or not, and that in no case shall they be required to exercise the power against their possible desire to the contrary; in other words, assume that the power granted is permissive only and under no circumstances mandatory. Again, this construction can hardly be considered wholly unreasonable. In order then to give effect to all the pertinent language of the amendment, there remains only the task of finding some reasonable, or rather some not unreasonable, method of permitting the electors of each municipal corporation of the requisite size "to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof". The only real source of ambiguity in this language lies in the words "the charter of". If these words were construed to mean "a charter for", there would be no shadow of conflict between the amendment and the statute. Even though such a construction may be considered a strained one, it is at least arguable that it does less violence to the language and its intended meaning than the construction adopted by the court, which requires us to read into the amendment the words "and the electors of each proposed

[14] Common Council of City of Jackson v. Harrington, 160 Mich. 550, 125 N.W. 383 (1910).

municipal corporation", and to construe "the charter" to mean "the original charter".

But full effect can be given to each word of the amendment as written without making either of these more or less strained constructions. For example, apply the language first to an existing city. This may be done, because in granting these home rule powers to the "electors of each municipal corporation" there was certainly no intent to exclude electors of existing municipalities. It would therefore seem clear that the electors of an existing city really have three choices: (1) They may continue to operate under the existing charter. (2) They may amend such charter only in some particular, as for instance the plan of city government, leaving all other provisions of the charter unchanged. (3) They may frame and adopt a completely new charter in its entirety. The first two choices give rise to no difficulty. As to the third, if a new charter is adopted as provided by law, may we not fairly and reasonably say that the electors of the city have framed and adopted "the charter of such corporation"? Of course, after the adoption of such a new charter, the electors also have the power to amend it. Thus we have given reasonable effect to the words "frame" and "adopt" in contrast to "amend", which was a matter of some concern to the court in its discussion. Now, if this is a permissible interpretation of the language as applied to existing cities, it would seem to be equally applicable to a newly-incorporated city. After issuance of the certificate of incorporation, the existing charter of the city would be found in the appropriate provisions of general law. The electors would then have the same three choices mentioned above. If they exercised the third choice, it could fairly and reasonably be said that they too had framed and adopted the city charter. In fact, under the court's interpretation they would be deprived of the first two choices, which as well as the third constitute rights guaranteed by the amendment.

If this lengthy and labored analysis has indicated that the court's interpretation was not the only permissible and reasonable one, then we can not avoid the conclusion that the court erred when it said that the statute was unconstitutional.

The discussion so far may have been too much in an academic vacuum. No account has been taken of the physical characteristics of the area within the proposed city limits of Belle. It may well be that the inclusion in these limits of 215 acres of highly valuable industrial land containing no inhabitants would have worked a

gross injustice. The court's recitation of these and other detailed facts concerning the area of the proposed city indicates that such considerations may have had some effect on its decision. One might even be inclined to approve all that the court did in this particular case were it not for the fact that there was another way to prevent the threatened injustice without passing upon the constitutionality of the statute. The proposed incorporation could have been stopped just as effectively if, instead of using a dictum to advise the county court that the statute was thought to be unconstitutional, the court had used the dictum to point out (1) that under the statute a condition precedent to incorporaion is a finding by the county court that the area to be incorporated is not disproportionate to the number of its inhabitants, (2) that in this case the court would consider such a finding wholly unreasonable and arbitrary, and (3) that in the exercise of its power to review the action of administrative tribunals, it would set aside any such finding when asked to do so. If the court had rendered this sort of advisory opinion in order to prevent a threatened injustice, little if any criticism of the decision could fairly be made. One can only regret that the court chose to give its advisory opinion on the constitutional question. It would seem, therefore, that the *Wiseman* case is an excellent example of the ancient adage that "hard cases make bad law".

Not even this justification can be made of the court's decision in other recent cases. They will not be discussed in such detail as was used in our examination of the *Wiseman* case, but enough will be said to indicate that they are subject to the same basic criticism.

Take, for example, the decision in *State* ex rel. *Dyer v. Sims*,[15] in which the court was able to discover something in our constitution that made it possible for the court to invalidate the act under which for more than ten years this state, as one of the parties to an interstate compact approved by the Congress of the United States, had been participating with many other states in a co-operative effort to discover and correct the sources of pollution of the Ohio River and its tributaries. It is submitted that this is not an unfair comment on the decision, because had the court approached the problem in the traditional manner, searching for some plausible ground on which to sustain the act, it would have been easy enough to uphold the legislative will that the State of West Virginia should co-operate in this desirable effort to correct a bad situation that so

[15] 58 S.E.2d 766 (W. Va. 1950).

materially affects the health and welfare of the citizens of this and the other states. There was at least one way to dispose of the case that would not have required the court to pass upon the particular constitutional issues that were raised by the auditor. It is an unquestioned principle of constitutional law that the United States Constitution and all laws enacted pursuant thereto are the supreme law of the land, superseding all state laws and even all state constitutional provisions that are in conflict therewith. This being true, our court might well have taken the position that the act of Congress, approving and giving its consent to this compact, made the agreement binding upon the states that signed it under legislative authority, all provisions of the constitutions of those states to the contrary notwithstanding. Even though it is conceded that the applicability of this constitutional principle to such a case is debatable, it would seem to be less so than the reasoning actually employed by the court in passing upon the objections that were made concerning the constitutionality of the compact. A consideration of the court's reasoning will require some review of the facts.

The case originated in the refusal by the auditor to sign a warrant for the payment of an appropriation made by the legislature for our fair share of expenses incident to the performance of the compact. The court refused to issue a writ of mandamus to compel payment, holding that the act providing for our execution of the compact was unconstitutional on two grounds, both of which seem questionable.

In the first place, it was held that the act contained an unconstitutional delegation of legislative power in that it authorized the commission established by the compact to make rules and regulations requiring persons in West Virginia to take action to prevent pollution, under penalty of law for refusal to do so. No discussion of the merits of this argument should be necessary here, because enough was said in the excellent dissenting opinion to show that the court's conclusion is unsound, or at least that there is reasonable doubt concerning its soundness. This is all that need be shown to sustain the constitutionality of the act against an attack based on that ground. But what is worse, the court in this case again anticipated a constitutional question that has not yet arisen and may never be presented. The commission has never made any such regulation. For ten years it has been acting only as an agency for the collection and dissemination of information concerning the extent of pollution and possible means of correcting the situation

by voluntary action. But even if such a regulation had been made, the question could properly be raised only by a person who was required thereby to act. Suppose, however, that the question was raised and that the court held unconstitutional the provision of the act authorizing the making of such regulations. What follows? Only that the commission has no authority to enforce its orders in West Virginia. The provisions of this act are not so inseparable as to require that the whole act fall because this part is invalid. There are left in the act and the compact many other workable provisions, in fact the only ones used so far, that call for co-operative rather than compulsory action to prevent pollution. The remainder of the compact is in effect the very sort of interstate agreement the court said it would favor and approve.

The second ground of the court's decision is even more questionable. It was held that since the compact was of indefinite duration, the legislature in 1939 when the act was passed attempted to bind future legislatures to make appropriations in discharge of a debt which under the constitution it had no authority to create. Therefore, said the court, the whole act is unconstitutional. This would seem to be another complete *non sequitur*. If the legislature had no authority to create a debt, none was created, and hence no subsequent legislature was bound to make an appropriation. But even under the court's argument, each legislature may still make appropriations for the next bieuuium and at the same time make or authorize the making of a contractual obligation to be paid out of such appropriation. If this be true, the very least we have under the court's argument is a compact good for two years, renewable or not for two year terms as each succeeding legislature may choose. Whenever as in the current biennium an appropriation is made, then our obligation under the compact is complete and binding for another two years, even though the next legislature may not be bound to continue the appropriation. But again, even if this line of argument is less sound than that of the court, it would seem to be not wholly unreasonable and hence should raise in the mind of the court a reasonable doubt concerning the validity of its conclusion that the act was unconstitutional in its entirety.

Although most other states have constitutional provisions similar to if not exactly like those relied on by our court in this case, no other court has ever invalidated one of the numerous interstate compacts on any such ground. The complete absence of authority on these points should argue the unsoundness of the court's position

that it was compelled to declare the statute unconstitutional. Again, as pointed out in the dissenting opinion, if the court had approached the problem in an effort to find a possible ground for upholding the statute, it would have been able to find arguments in favor of the statute that were as plausible as those used against it. One has difficulty in avoiding the conclusion that in this case the court was searching for a way to strike down the act rather than for some ground on which to sustain its constitutionality.

There remains another group of cases in which the court has shown no hesitation whatever in substituting its opinion for that of the legislature. The cases referred to are those involving the validity of an appropriation by the legislature to discharge what it found and declared to be a moral obligation of the state.

Fortunately it will not be necessary to examine these cases in detail. Most of them were adequately discussed in a recent student note in this Review.[16] In the half dozen or so cases decided on this question since that note was written, the court has maintained its position that in passing upon the validity of a legislative finding that a moral obligation exists, the court has and must exercise the authority to substitute its own judgment for that of the legislature on the question whether there is in fact any moral obligation. If any change is apparent in these recent cases, it lies in a greater willingness on the part of the court to permit its judgment to coincide with that of the legislature. But this is not enough.

The whole approach of the court to this problem appears to be unsound and is subject to the same criticism that was made above of its method of handling other constitutional issues. The only question here should be whether a person could reasonably believe that there was a moral obligation on the part of the state under the particular circumstances. For unless the court is convinced that the action of the legislature in declaring the existence of a moral obligation was wholly unreasonable and arbitrary, it should not under accepted constitutional principles set aside the legislature's action, though it may have the power to do so. Although, as pointed out in the note mentioned above, the overwhelming weight of judicial authority is in accord with this view, our court insists upon its right to hold the act of the legislature unconstitutional whenever it concludes that had the question been presented to it in the first instance, it would have found that there

[16] Note, 52 W. VA. L. REV. 57 (1949).

was no moral obligation. This seems clear from the following statement in one of the recent cases:

> "Although the factual findings of the Legislature in adopting the findings of the court of claims are entitled to great weight, the matters involved therein being in their nature primarily juristic, as defined in the Cashman case, the findings are subject to judicial review, and this Court must decide whether the facts portrayed by the instant record create a moral obligation against the State and in favor of relator."[17]

No valid objection can be made to the court's conclusion that the legislature's finding of a moral obligation is subject to judicial review, this being necessary to prevent wholly unreasonable and unwarranted action by the legislature in authorizing payment of claims that involve not even the shadow of a moral obligation. There is, however, ground for serious disagreement with the other conclusion that in reviewing the finding of the legislature the court must decide the question whether there was in fact a moral obligation. Note how materially this differs from the only question the court should consider in such a case, namely, is the court convinced that no reasonable person could find, as the legislature did, that the facts of the case give rise to a moral obligation? Judicial review that involves consideration of any broader question than this constitutes a violation of the principle of separation of powers, which even in its most liberal form is designed to prevent any branch of the government, the judicial as well as the legislative or executive, from seriously encroaching upon the proper domain of either of the other two. As was pointed out above, any criticism along these lines is doubly applicable to our court which, under its "new and strict" doctrine of the separation of powers, has been so careful to protect its own domain from the slightest invasion by the legislature. This is obviously the most serious and valid objection to our court's method of handling these moral obligation cases.

Beyond this, however there is involved in the position of the court a logical difficulty of some magnitude. In substance, the present view of the court on this subject is that, in deciding whether it thinks there is an existing moral obligation on the part of the state, it will apply the same legal and equitable principles which would be applicable to a similar situation involving private persons. Consequently the court holds that the legislature lacks the constitutional power to recognize a moral obligation on the part of the state to pay compensation for any injury that would under

[17] State *ex rel.* Catron v. Sims, 57 S.E.2d 465, 468 (W. Va. 1950).

existing law not be compensable in an action between private persons. No one, however, can question the power of the legislature, within broad constitutional limits, to change the existing law applicable to suits between private litigants. If such a change were made creating a new cause of action as between private persons, it would automatically follow under the court's view that there would be a new basis for a moral obligation. How then can it reasonably be said that the power of the legislature to recognize a moral obligation of the state is limited to situations that under existing law would give rise to a right of action in private litigation?

The present position of the court is subject to the further practical objection that it requires the court to use too much of its limited time in reviewing these moral obligation cases. It is no wonder that the auditor has asked for judicial review of every case in which he thinks there is no moral obligation. To a disinterested observer there is something prima facie wrong with any rule that makes it necessary for the court to devote to one problem four of its twenty-three opinions appearing in a single volume of the reports, as was recently the case with our court and its rule concerning moral obligations.[18] The flood of litigation that is invited by the court's present view is not only unfair to the court itself, overburdened as it is with other work, but also eminently unfair to the successful claimants who have already had to bear the expense and delay incident to the establishment of the state's moral obligation before the court of claims and the legislature.

In view of all these objections to the court's method of dealing with this problem, one can understand what led Judge Lovins to make the following comment:

> "In my opinion, this Court . . . has placed itself in an unenviable position which gives rise to a confused concept of law and a chaotic condition. Ultimately, this Court must resolve itself to adopt either the principles enunciated in this dissent, or, in the alternative, accept as final any legislative finding of the existence of a moral obligation. At present this Court is merely astride a thorny fence. . . ."[19]

It is not necessarily true, however, that the court must either refuse to allow payment of all claims based on a moral obligation or accept as final all findings by the legislature that there is such an obligation. Neither of these alternatives offers a satisfactory solution of the problem. There is, however, a third alternative which

[18] 58 S.E.2d.

[19] State *ex rel.* Catron v. Sims, 57 S.E.2d 465, 469 (W. Va. 1950).

would seem to be more desirable, and which would certainly be more consistent with established principles of constitutional law. The court should continue to hold that a legislative finding of moral obligation, like other legislative action, is subject to judicial review, but should limit the scope of its review to a determination of the question whether the action of the legislature was so unreasonable and arbitrary as to compel the court to set it aside.

Although there are other recent cases that could be cited in support of the position taken in this discussion, enough has been said to point out the one serious criticism that may be made of the decisions of our court on constitutional questions. It is believed that a more rigid adherence to accepted principles of constitutional law not only would accord to legislative action the dignity it deserves, but would better safeguard our established and now essential doctrine of judicial supremacy.